

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Implement
Senate Bill No. 1488 (2004 Cal. Stats., Ch. 690
(Sept. 22, 2004)) Relating to Confidentiality of
Information.

R.05-06-040
(Filed June 30, 2005)

**SCOPING MEMO AND RULING OF
ASSIGNED COMMISSIONER AND ADMINISTRATIVE LAW JUDGE**

I. Summary

This ruling and scoping memo (Scoping Memo) confirms certain rulings made at the September 21, 2005 Prehearing Conference (PHC). The Scoping Memo sets forth the scope and schedule of the proceeding, addresses the topics appropriate for hearing, and lists other procedural requirements.

II. Schedule

Event	Schedule
Revised matrix ¹ served by Respondent Investor Owned Utilities (IOUs) and Energy Service Providers (ESPs), containing at least two new columns: 1) explanation of each data category for laypersons not familiar with the records, and 2) list of the procurement umbrella proceedings in which each category of data in the matrix might be relevant ²	10/21/05

¹ The term “matrix” refers to Appendix A to the Order Instituting Rulemaking (OIR) that initiated this proceeding. Appendix A listed data categories germane to utility procurement activities, and the Energy Division’s initial, non-binding determination of the proper confidentiality treatment for each category. The large Investor Owned Utilities (IOUs), Pacific Gas and Electric Company (PG&E), Southern California Edison company (SCE), and San Diego Gas and Electric Company (SDG&E), revised the matrix to include their views on the proper treatment of each category in their opening comments served in this proceeding. While both the Energy Division’s initial determination and the IOUs’ revisions are preliminary and not binding on the Commission, for the sake of consistency all parties shall use the revised version of the matrix served with the IOUs’ opening comments as the starting point for their own revisions.

² The OIR lists the umbrella proceedings as the following:

- R.04-04-003, the procurement proceeding;
- R.03-10-003, the community choice aggregation rulemaking;
- R.04-04-025, the avoided cost and QF pricing rulemaking
- R.04-04-026, the renewables portfolio standard rulemaking
- R.04-03-017, the distributed generation rulemaking;
- R.01-08-028, the energy efficiency rulemaking;
- I.00-11-001, the transmission planning investigation; and
- R.04-01-026, the transmission assessment process rulemaking.

Event	Schedule
Opening testimony due	10/28/05
Reply testimony due	11/15/05
Hearings	11/28/05-12/2/05 9:00 a.m. – 4:00 p.m. 505 Van Ness Avenue, San Francisco

III. Scope of the Proceeding (Phase One)

The scope of Phase One of this proceeding is limited to interpretation and implementation of SB 1488 as it applies to electric procurement. As stated in the OIR, Phase Two will focus more generally on confidentiality of documents germane to Commission action. We will issue further direction regarding Phase Two at an appropriate time.

A. Issues

Our goal in this proceeding is to allow meaningful public participation and ensure open decision making while taking into account our statutory obligations to protect the confidentiality of market sensitive information. Phase One will focus on the following issues:

1. The Commission's practices under Pub. Util. Code § 454.5(g), including interpretation of term "market sensitive" information.
2. The Commission's practices with regard to electric procurement data under Pub. Util. Code § 583.
3. The Commission's practices with regard to electric procurement data under the California Public Records Act, Cal. Gov. Code § 6250 et seq.

4. How to provide for meaningful public participation and ensure open decision making as required by SB 1488.
5. The confidentiality protections due Respondent IOUs, ESPs, Community Choice Aggregators (CCAs), and, as described below, electric Small and Multijurisdictional Utilities (SMJUs).³
6. Harm to ratepayers, IOUs, ESPs, CCAs, SMJUs, or the public interest from release of confidential information.
7. How utilities not named as Respondents, including PacifiCorp and Modesto Irrigation District, treat data related to their procurement responsibilities.
8. Consistent treatment of procurement information across proceedings, as discussed in Section III(B)(2) below.
9. Development of model confidentiality agreements and protective orders for use across procurement proceedings. To the extent previous confidentiality agreements or protective orders (as described in the OIR) have been developed, parties may address the appropriateness of continuing to use those agreements and orders.
10. Treatment of market participating parties and non market participating parties in previous procurement decisions and protective orders.

B. Limitations

1. Phase One will examine confidentiality only in the context of the following proceedings, *and only to the extent the proceedings focus on the utilities' procurement responsibilities*.

³ While the OIR named all California CCAs as Respondents, no CCAs have yet been approved. We invite, but do not require, prospective CCAs to participate in the hearings and other aspects of this proceeding. Once a CCA is approved for operation, it shall participate in this proceeding as a Respondent.

- R.04-04-003, the current electric procurement proceeding;
- R.03-10-003, the community choice aggregation rulemaking;
- R.04-04-025, the avoided cost and QF pricing rulemaking;
- R.04-04-026, the renewables portfolio standard rulemaking;
- R.04-03-017, the distributed generation rulemaking;
- R.01-08-028, the energy efficiency rulemaking;
- I.00-11-001, the transmission planning investigation; and
- R.04-01-026, the transmission assessment process rulemaking.

2. Other proceedings:

At the PHC, The Utility Reform Network (TURN) proposed that we expand the category of procurement records at issue in this proceeding to include those relevant to the utility-owned generation cases, identifying proceedings related to the Diablo Canyon, San Onofre, Contra Costa 8 and Mountainview power plants. TURN clarified that in the foregoing cases, the IOUs typically introduce information from their procurement plans under seal. TURN suggested that we treat such records consistently whether they are relevant to the proceedings listed in 1 above or to other Commission proceedings in which the same data are relevant. We agree that consistency in treatment of procurement data is the goal and that developing means to ensure such consistency is within the scope of this proceeding.

IV. Hearings

The hearings will address four key (and sometimes intersecting) issues, as follows:

A. Description of Data

The parties shall explain the nature of the procurement data listed in the matrix referred to above. Parties shall assume that the decision makers are not intimately familiar with each type of data listed in the matrix, and that a record explaining these data is necessary to an educated decision about how to treat the data. The parties should use the matrix as their starting point to explain the data, proceeding in the order the data are listed in the matrix. As noted above, the parties may supplement the matrix as necessary prior to the hearings, but should all work from a consistent matrix at the hearings.

B. Harm

The second goal of the hearings, to the extent not already covered in the matrix or testimony describing the data in the matrix, is to develop a record demonstrating how the data in the matrix are used in the market for electricity. To the extent that parties claim that public release of the data could be detrimental to ratepayers, IOUs, ESPs, CCAs, SMJUs (described below), or to the public interest generally, parties shall document such alleged harm.

If the data are already available publicly in another regulatory forum or for purchase, those claiming the records are confidential shall disclose what data are available and where. As the OIR stated, "Parties claiming the need for confidentiality must also be able to show that their information is not already in the public record at another agency or in another Commission proceeding. It is not reasonable to claim confidentiality at the Commission for information already released publicly in another forum." Parties opposing such designation may also demonstrate that the data at issue are already in the public domain.

We strongly encourage that parties present expert testimony on the issue of alleged harm from release (or sealing) of procurement related data.

C. Release of Partial Data

Parties shall also be prepared to address means of releasing partial data rather than sealing data outright. The OIR listed several such methods: partial sealing of documents; redaction; aggregation of data to mask individualized, sensitive information; delayed information release (after documents are no longer market sensitive); restriction on personnel with access to documents; use of averages, percentages or annualization of data instead of monthly or hourly data; and issuance of guidelines for parties to follow in producing redacted information (*e.g.*, leaving headings in documents; limiting redactions to figures only; and leaving sufficient information in documents to give other parties notice of what has been redacted). Any party seeking to designate procurement data as confidential shall first address the feasibility of the foregoing methods as to each category of data.

D. Other Utilities

In comments, several parties identified other utility procurement processes – such as those of PacifiCorp and the Modesto Irrigation District – in which most data is open to public inspection. Parties familiar with these procurement processes may describe them at hearing, and demonstrate why a similar process would work for Respondents in this proceeding or otherwise further the public interest. Parties opposing such a process may present their concerns.

V. Hearing Room Ground Rules/Opening Statements

Parties shall follow the Hearing Room Ground Rules (Appendix A) regarding hearing process, exhibits, and cross-examination. Parties shall also be prepared to give brief opening statements at the commencement of the hearings. Prior to the hearings, all parties shall arrange among themselves the order and

timing of the opening statements, with the proviso that each party shall have no more than 15 minutes each to make its statement.

VI. Small and Multijurisdictional Utilities (SMJUs)

The Governor recently signed AB 380, requiring all California Load Serving Entities (LSEs), including certain small and multijurisdictional electric utilities (SMJUs) not named as Respondents in this proceeding, to demonstrate to the Commission that they have adequate electric resources to serve the needs of California. The electric SMJUs in California are Avista Utilities, Bear Valley Electric Company (Bear Valley),⁴ Mountain Utilities, Sierra Pacific Power Company and PacifiCorp.

While the Commission has not yet commenced a proceeding to implement AB 380, it appears clear that in the future, electric SMJUs will be required to submit procurement information to the Commission. The same confidentiality issues that the IOUs and ESPs are now raising are likely to arise with regard to the electric SMJUs. So that the SMJUs may participate in the upcoming hearings, we will serve this scoping memo on the list appended hereto as Appendix B. We urge these SMJUs to participate.

VII. Category of Proceeding

The Commission preliminarily determined that this is a quasi-legislative proceeding for which no hearings are likely to be required, but reserved the right to hold hearings in the proceeding after we received comments. The Commission invited objections to its initial categorization. No party has expressed any objection. This ruling confirms that the proceeding is quasi-

⁴ Bear Valley is operated by Southern California Water Company.

legislative. Based on the comments, we find that hearings are necessary on the issues described above.

VIII. Presiding Officer

Pursuant to Rule 6(c), Assigned Commissioner Grueneich designates Administrative Law Judge (ALJ) Sarah R. Thomas as the presiding officer. ALJ Thomas is authorized to modify the schedule and make procedural decisions as required to assure the fair and efficient conduct of the proceeding.

IX. Service List

The service list for this proceeding is on the Commission's website at http://www.cpuc.ca.gov/published/service_lists/R0506040_70417.htm. Parties are requested to serve everyone, whether characterized as "appearance," "state service," or "information only," with all pleadings, prepared testimony, and other documents submitted to the Commission or other parties. All documents shall be served by email in accordance with the Commission's electronic service rule, Rule 2.3.1, available at http://www.cpuc.ca.gov/PUBLISHED/RULES_PRAC_PROC/46095-02.htm#P341_33469.

X. Communications With Decision Makers (*Ex Parte* Communication)

Pursuant to Pub. Util. Code § 1701.3, *ex parte* communications are allowed without restriction in this proceeding. However, ALJ Thomas will not accept *ex parte* contacts related to the proceeding. Contacts related to matters purely of a procedural nature are allowed. ALJ Thomas will copy the service list as practicable on all contacts of any nature.

XI. Discovery Disputes

If the parties have discovery disputes they are unable to resolve by meeting and conferring, they should first raise these disputes with ALJ Thomas orally, at (415) 703-2310. She will then instruct the parties how to proceed.

IT IS RULED that:

1. The schedule and scope of this case are as set forth in this Scoping Memo, unless subsequently modified by Assigned Commissioner or Administrative Law Judge (ALJ)

2. Hearings are necessary.

3. This proceeding is quasi-legislative.

4. ALJ Thomas is the presiding officer in this proceeding.

5. The service list for this proceeding is on the Commission's website at http://www.cpuc.ca.gov/published/service_lists/R0506040_70417.htm. Parties are requested to serve everyone, whether characterized as "appearance," "state service," or "information only," with all pleadings, prepared testimony, and other documents submitted to the Commission or other parties. All documents shall be served by email in accordance with the Commission's electronic service rule, Rule 2.3.1, available at http://www.cpuc.ca.gov/PUBLISHED/RULES_PRAC_PROC/46095-02.htm#P341_33469.

6. Parties shall follow ALJ Thomas' Hearing Room Ground Rules contained in Appendix A to this ruling.

7. Parties shall make opening statements at the commencement of the hearings. Prior to the hearings, all parties shall arrange among themselves the order and timing of the opening statements, with the proviso that each party shall have no more than 15 minutes each to make its statement.

8. Small and multijurisdictional electric utilities Avista Utilities, Bear Valley Electric Company, Mountain Utilities, Sierra Pacific Power Company and PacifiCorp are urged to participate in all aspects of this proceeding.

9. Pursuant to Pub. Util. Code § 1701.2(b), *ex parte* communications are allowed without restriction. ALJ Thomas will not accept *ex parte* contacts related to the proceeding. Contacts related to matters purely of a procedural nature are allowed. ALJ Thomas will copy the service list as practicable on all *ex parte* contacts of any nature.

10. Parties shall first contact ALJ Thomas regarding discovery disputes orally, and then follow any procedure she outlines thereafter.

Dated October 17, 2005, at San Francisco, California.

/s/ DIAN M. GRUENEICH
Dian M. Grueneich
Assigned Commissioner

/s/ SARAH R. THOMAS
Sarah R. Thomas
Administrative Law Judge

APPENDIX A

HEARING ROOM GROUND RULES ALJ Sarah Thomas

1. All prepared written testimony should be served in accordance with the Commission's e-service rules in Rule 2.3, as well as on the Assigned Commissioner's office and on the Assigned ALJ. Prepared written testimony shall not be filed with the Commission's Docket Office.
2. Each party sponsoring an exhibit should, in the hearing room, provide two copies to the ALJ and one to the court reporter, and have copies available for distribution to parties present in the hearing room.
3. The lower right hand corner of the exhibit cover sheet should be blank for the ALJ's exhibit stamp. If there is not sufficient room in the lower right hand corner for an exhibit stamp, please prepare a cover sheet for the exhibit.
4. As a general rule, if a party intends to introduce an exhibit in the course of cross-examination, the party should provide a copy of the exhibit to the witness and the witness' counsel before the witness takes the stand on the day the exhibit is to be introduced. A party is not required to give the witness an advance copy of the document if it is to be used for purposes of impeachment or to obtain the witness' spontaneous reaction.
5. Corrections to an exhibit should be made in advance and not orally from the witness stand. Corrections should be made by providing new exhibit pages on which corrections appear. The original text to be deleted should be lined out with the substitute or added text shown above or inserted. Each correction page should be marked with the word "revised" and the revision date.
6. Individual chapters of large, bound volumes of testimony may be marked with separate exhibit numbers, as convenient.
7. Partial documents or excerpts from documents must include a title page or first page from the source document; excerpts from lengthy documents should include a table of contents page covering the excerpted material.
8. Parties should agree on an exhibit numbering scheme in advance of hearing. One party may use exhibits 1-100, the next party may use 101-200, and so on.

All exhibits shall be pre-marked with their number and the name of the sponsoring party.

9. Confidential exhibits should bear the appropriate exhibit number and be followed by the letter "C." A redacted copy of such an exhibit shall also be provided for the public record. Thus, the confidential version of Exhibit 1 will be marked Exhibit 1-C, and the redacted (public) version of the document will be marked Exhibit 1.
10. During the hearing, the ALJ may ask one party to create a running exhibit list (with designation of the sponsoring party, the name of the document, whether exhibits are in evidence, and the date on which they were identified and received in evidence) and furnish it to the ALJ and all other parties.
11. No food is allowed in the hearing room; drinks are allowed if you dispose of containers and napkins every morning and afternoon.

(END OF APPENDIX A)

APPENDIX B

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(END OF APPENDIX B)

CERTIFICATE OF SERVICE

I certify that I have by mail this day served a true copy of the original attached Scoping Memo and Ruling of Assigned Commissioner and Administrative Law Judge on all parties of record in this proceeding or their attorneys of record.

Dated October 17, 2005, at San Francisco, California.

/s/ ELIZABETH LEWIS
Elizabeth Lewis

N O T I C E

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address to insure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.

The Commission's policy is to schedule hearings (meetings, workshops, etc.) in locations that are accessible to people with disabilities. To verify that a particular location is accessible, call: Calendar Clerk (415) 703-1203.

If specialized accommodations for the disabled are needed, e.g., sign language interpreters, those making the arrangements must call the Public Advisor at (415) 703-2074, TTY 1-866-836-7825 or (415) 703-5282 at least three working days in advance of the event.